Supreme Court of the U. S.

OCTOBER TERM, A. D. 1877.

THE COUNTY OF MACON,
Plaintiff in Error,
vs.
JAMES F. SHORES.

No. 129.

Error to the Circuit Court of the United States for the Western District of Missouri.

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Statement of the Case.

On the 18th day of April, 1874, the defendant in error filed an amended petition in the court below, the first count of which is as follows: Plaintiff, James F. Shores, states that he is a citizen and resident of the State of New Hampshire; that defendant is a municipal corporation, created by and existing under the laws of the State of Missouri, and within the Western District of Missouri.

And for cause of action, plaintiff states that heretofore, to wit: On the second day of May, A. D. 1870, the defendant, by its certain writing obligatory, called bond No. 11, of said County of Macon, attested by John Farrar, the then clerk of said court, and sealed with the seal of said court, and bearing date the day and year aforesaid, promised to pay the Missouri & Mississippi Railroad Company, or bearer, at the National Bank of Commerce, in the City of New York, on the 2d day of May, A. D. 1890, the sum of one thousand dollars, with interest at the rate of eight per cent. per annum, payable semi-annually, on presentation of coupons thereto attached.

Plaintiff states that said bond was issued under and pursuant to orders of the County Court of Macon County, for subscription to the stock of said company, and was authorized by an act of the General Assembly of the State of Missouri, entitled "An Act to incorporate the Missouri & Mississippi Railroad Company," approved February 20th, 1865, and that said bond so recites on its face. Plaintiff further states that defendant has paid the interest on said bond for year 1870. Plaintiff further states that he is the holder and bearer for value of coupon No. 5, detached from said bond and of even date therewith, and herewith filed, whereby defendant promised to pay bearer the sum of forty dollars on the 2d day of November, A. D. 1872, at the National Bank of Commerce, in the City of New York. Plaintiff says that at the maturity of said coupon the same was presented at said bank for payment and payment thereof refused. Plaintiff states that the same is still due and unpaid; wherefore, plaintiff asks judgment for the sum of forty dollars, and interest and damages at the rate of ten per cent. for non-payment."

There are 166 counts in said petition, and they are all in the same form as the first count, and are for the aggregate sum of $6,640, and interest and damages.

On the 1st of May following the plaintiff in error filed its answer to this amended petition, in which it denied that it ever promised to pay the bonds described in said petition, or any of them; or that they were issued pursuant to orders of the County Court of Macon County for subscription to the stock of the Missouri & Mississippi Railroad Company; or that they were or are authorized by an act of the General Assembly of the State of Missouri, entitled "An act to incorporate the Missouri and Mississippi Railroad Company," approved February 20th, 1865, to make said subscription; or that defendant in error is the holder or bearer for value of the coupons sued on; or that any subscription to the capital stock of the Missouri & Mississippi Railroad Company

was made or authorized by order of the County Court of Macon County.

Plaintiff in error averred that the coupons sued on were issued without authority of law, were unauthorized and fraudulent.

Plaintiff in error further averred that the bonds described in the petition were executed and issued in pursuance of a combination, confederation, conspiracy, and fraud, entered into between the officers of the county executing said bonds and the pretended Missouri & Mississippi Railroad Company, by its officers, agents, and confederates, for the purpose of cheating and defrauding the plaintiff in error and its tax-paying citizens; and that defendant in error became the holder of the coupons sued on with full knowledge and notice of said combination, confederation, conspiracy, and fraud; and that he was not the *bona fide* holder of said coupons, but that he took them for the purpose of fraudulently conferring jurisdiction on the Circuit Court of the United States for the Western District of Missouri, the real holders being citizens of Missouri.

For a further defence it is averred that the Missouri and Mississippi Railroad Company was acting as a corporation, claiming to have organized under an act of the General Assembly of the State of Missouri, entitled "An act to incorporate the Missouri and Mississippi Railroad Company," approved February 20, 1865. That it contemplated building a railroad from the town of Macon, in the county of Macon, in the State of Missouri, through the town of Edina, in the county of Knox, and thence to or near the northeast corner of the State of Missouri, in the direction of Keokuk, in Iowa, or Alexandria, in Missouri, and from the town of Macon in a southwesterly direction to the Missouri river. That the building of said railroad was and is a wild and visionary enterprise; that if completed it would have no railroad connection, north or south, would traverse a sparsely-settled country,

affording but a very small amount of business for a railroad; that there were and are still two main trunk lines of completed railroads running centrally through Macon county, crossing each other at right angles in Macon city, the county seat of said county, one, the North Missouri railroad, running from south to north, the other, the Hannibal and St. Joseph railroad, running from east to west, furnishing ample means of transportation for all passengers and property demanding transportation; that said contemplated railroad would not run in the right direction, or through the proper portion of country to make it a paying investment in the future for Macon county; that if completed it would not do enough business to pay for operating it; that this condition of things was notorious. Notwithstanding the County Court of Macon county, on the 2d day of April, 1867, subscribed $175,000 to said Missouri and Mississippi Railroad Company, and issued bonds in payment of said subscription. That the proceeds of the sales of these bonds were all exhausted and no railroad was built, nor any part thereof, and the enterprise was notoriously known as a failure and the company bankrupt. That at the time of making the subscription in controversy, *i. e.*, on the 12th day of April, 1870, the County Court of Macon county was composed of J. R. Alderman, W. D. Roberts, and C. P. Hess; that said Roberts was a stockholder and director in said Missouri and Mississippi Railroad Company at the time of making said pretended subscription, and said Alderman and Roberts were both large stockholders in the Western Coal Company, whose mines and coal fields were on and contiguous to the line of said projected railroad, and James W. Lewis, president of said railroad company, was also a large stockholder in said coal company.

In this condition of things, said Missouri and Mississippi Railroad Company proposed to one McKay that if he and his associates would prevail upon and induce said

justices of Macon County Court to make a further subscription of $175,000 to the capital stock of said railroad company, it would give them the contract for the grading of 16 miles of road south of Macon city, and would pay McKay and his associates for said grading the sum of 20 cents per yard more than the usual price given for similar work, as a bonus; and he could take in whomsoever he pleased as partners. Thereupon said McKay informed said Alderman and Robers of said offer, and he proposed to take them in as secret partners in said proposed contract, and to give them several of the bonds of Macon county that should be issued in payment of said subscription, and money and other considerations if they would make said subscription; that said proposals had the desired effect, and induced and caused said Alderman and Roberts, as justices of Macon county, against the will of C. P. Hess, the third justice, and in violation of the confidence reposed in them as justices of said county court, and in disregard of their solemn duty to the county and its tax-payers, corruptly to accept said offer; and in pursuance thereof, said Alderman and Roberts, on the 12th day of April, 1870, corruptly, wrongfully, illegally, and oppressively made an order pretending to subscribe said $175,000 additional stock to said railroad company, and to issue the bonds of the county therefor, without the assent of two-thirds of the qualified voters of said county, no election, general or special, having been held to procure such assent, but against the wishes of a large majority of said voters and tax-payers. The order making said subscription required the railroad company to expend the money arising therefrom south of Macon city, and to accept the same by a resolution of its board of directors, to be filed with the clerk of the county court of Macon county.

This was done the same day; and said railroad company had, previously to the day of making said order, caused bonds to be lithographed to conform to the requirements of said order, so as to facilitate with greater

dispatch the begun fraud. Soon after the signing of said bonds by Alderman, as presiding justice of Macon County Court, and Farrar, as clerk thereof, they were delivered to Clark, the attorney, and Glaze, the treasurer of said railroad company, and by them deposited with Bartholow, Lewis & Co., of St. Louis, for the purpose of negotiation; but they were not negotiated before a suit was commenced in the Circuit Court of Macon County, Missouri, by Joseph S. Newmeyer and J. B. Clark, two tax-payers of said county, against Macon County Court, the Missouri & Mississippi Railroad Company, and Bartholow, Lewis & Co., for the rescision of said order of subscription and the cancellation of said bonds. Said suit was commenced on the 11th day of June, 1870, and process was served on all of said parties by the 12th day of June following, and it has been pending ever since undetermined.

As a further defence, it is averred that, under the Constitution of the State of Missouri, the County Court of Macon County had no authority to make said subscription without the assent of two-thirds of the qualified voters of Macon County, and no such assent was given. That said pretended Missouri & Mississippi Railroad Company had, at the time of said pretended subscription, no corporate power or existence, never having organized or accepted said act of February 20th, 1865; nor did it commence the transaction of its business within the time prescribed by law for that purpose. No interest was paid on said bonds after Alderman and Roberts went out of office, and honest men were elected to fill their places as justices of said County Court; wherefore, defendant says that said pretended subscription and issue of bonds were invalid.

It is averred that the defendant in error, and all those from whom he purchased said bonds and coupons, purchased them with due and full notice of the several defences alleged in said answer.

Defendant in error filed a reply to said answer, in which he denied most of the material allegations therein, and he admitted the institution and pendency of the tax-payers' suit, but he alleged that "he had no notice of such suit, was not a party to the same, and is in nowise affected thereby."

The case was tried at the November term, 1874, of the court below. The defendant in error, to maintain the issues on his part, read in evidence—

1st. One of the bonds in controversy. (p. 126 of Transcript.)

2d. A copy of the order of the County Court of Macon County making the subscription in controversy (p. 127 *ibid*).

3d. A copy of the resolution of the Board of Directors passed and accepted by Alderman the *same* day of making said order, accepting the same (p. 128 *ibid*).

4th. The charter of the Missouri & Mississippi Railroad Company (p. 129 *ibid*).

5th. Coupons sued on. (For form of which see p. 131 *ibid.*)

6th. George M. Edgerton, being duly sworn, the defendant in error offered to prove by him that he is the *bona fide* holder and owner, for value, before maturity, of the coupons sued on without notice.

The plaintiff in error objected to the introduction of evidence to prove said facts, for the following reasons, viz.

1. Because the coupons sued on are negotiable instruments, the title to which passes from one person to another by delivery, and plaintiff having said coupons in his possession, is, *prima facie*, the legal owner and holder thereof for value before maturity, without notice of any legal defence thereto, and is entitled to recover on them without any evidence other than the possession and production of said coupons, unless the defendant shall first

invalidate the plaintiff's *prima facie* case, by evidence of want of authority to issue said coupons and bonds to which they were attached, by fraud, bribery, or illegality in the inception of said bonds.

2. Because the onus is on the defendant in the shape in which the issues are presented by the pleadings in this case to first establish the defence or one of the defences set up in the defendant's answer, before the plaintiff can be required to introduce any evidence other than that already introduced to rebut said defence.

The court overruled said objection and allowed the defendant in error to introduce said evidence in the present state of the case. To this ruling the plaintiff in error, at the time, excepted.

The testimony of this witness tended to show that W. J. Lewis was president, T. J. Bartholow was treasurer, and the witness was secretary of the Missouri Bond and Stock Board at the time the bonds in question were negotiated to the defendant in error; that he got these bonds from Bartholow, Lewis & Co. at divers times between the 24th of May, 1870, and the 2d of February, 1872, for defendant in error. He gave witness an order for a certain number, and paid 77½ cents on the dollar for them. He (witness) was in Macon city at the time the county court made the subscription; "had some knowledge the bonds were to be issued" (p. 133 of transcript). J. W. Lewis, president of the railroad company, was also a member of the firm of Bartholow, Lewis & Co., and they had the negotiation of the bonds for the railroad company. T. J. Bartholow was also a member of the firm of Bartholow, Lewis & Co. He took the Macon Weekly Times, in which the tax-payers' meetings were published, as will be shown in the evidence of the plaintiff in error.

The plaintiff in error, to maintain the issues on its part, introduced evidence tending to show that the railroad company paid James A. Clark $18,000 in bonds for procuring subscription to its capital stock (p. 133, 135 of transcript,) and employed other lawyers to attend to its

legal business. Clark himself testified, (p. 125 of transcript:)

"The company did not agree to pay me a stated salary for my services. They paid me for my time, trouble and *expense*. It required a great deal of trouble to procure the stock. * * * Soon after the subscription was made the company paid me $25,000. I got a good round fee; think I am old enough to get all I can. The $25,000 was paid me during the winter of 1870. It was paid in *cash*. I made three visits to Macon city to procure the stock. I was there about three days each time. My traveling expenses was about five cents per mile. The distance from Macon to Glasgow (where he resided) is about 50 miles. I think John Farrar got $200 for signing up the bonds as county clerk." "No vote was taken to obtain the consent of the qualified voters of the county; the court acted on my motion alone." (p. 136 *ibid.*)

"No part of this subscription was expended in building the road south of Macon city, and no work was done on the road south of Macon city, in Macon county. It was used to pay the debts and clear up the work to Edna, in Knox county, and finish the whole road." (J. W. Lewis' testimony, p. 133 *ibid.*)

The evidence showed that J. W. Alderman, W. D. Roberts, and C. P. Hess comprised the County Court, that W. D. Roberts was a stockholder and director in the Missouri and Mississippi Railroad Company at the time of making said subscription; that he acted as a justice of the County Court in making said subscription, and again as a director of said railroad company in accepting said subscription. That he and Alderman were both stockholders in the Western Coal Company; that its mines and coal fields were on and contiguous to the line of the contemplated railroad; that this coal company had a contract with the railroad company as alleged

in the answer of plaintiff in error; that whilst the application to make said subscription was pending before the County Court, Alderman and Roberts did frequently leave the bench to confer in a private way with Clark, the attorney for the railroad company. (p. 140, Hess' testimony; p. 141, 142, John Farrar's testimony; p. 159, A. L. Gilstrop's testimony, p. 158.) That Alderman was paid $3,000 for making this subscription and Hess $1,000. (pp. 160, 161, Mrs. Harrison's testimony; p. 149, Fletcher White's testimony; p. 160, Wm. H. Sear's testimony; p. 161, Stock-book of M. & M. R. R. Co.; p. 158, Albert Blair's testimony; p. 154 D. C. McKay's testimony.)

The evidence tended to show that, on the 9th day of May, 1870, twenty-five bonds were delivered to Glaze, the treasurer of the M. & M. R. R. Co., and on the 3d day of June, 1870, fifty more bonds were delivered to him; and on the 1st day of June, 1870, one hundred of said bonds were delivered to Clark, the attornay for said company.

The evidence further tended to show that Hess, one of the justices of Macon County Court, never consented to the order making said subscription, and that the county court was not in session on the day on which said order purports to have been made (p. 139 Hess' testimony; pp. 140, 141, John Farrar's testimony.) The defendant in error objected to the reading in evidence the following portion of C. P. Hess' deposition, viz:

"I, as one of the justices, refused to subscribe $175,000 additional stock to said railroad company, and never consented to do so, and so informed the justices, Roberts and Alderman, and the attorney for said company, James A. Clark, at the time;" and "which entries are in the following words: 'continued for further consideration by order of the court; not to be put on record; April 13th, 1870. John Farrar, clerk.'"

For the reason that the records of the county court could not be proved in this way, but must be proved by

a certified copy thereof, the court sustained said objection. To this ruling of the court the plaintiff in error, at the time, excepted.

The defendant in error objected to the reading in evidence the following portion of John Farrar's deposition, viz:

"On the 23d day of February, 1870, upon the filing of the petition, is the following entry, as made on the minutes of the court, to wit: "Ordered read, papers filed, and continued till March adjourned term, 1870."

"On the 12th day of April, 1870, the minutes of the court read as follows: 'April 12th, 1870, the court met pursuant to adjournment. Officers present: Board of Equalization, W. D. Roberts and C. P. Hess, justices, and John Farrar, clerk.' After the word 'present,' above, the name 'J. R. Alderman,' as wrote by me, is erased by pen being drawn across the same, and the words 'board of equalization' are interlined, and are not in my handwriting. Following the above entry on the minutes of said court, appear the following words and figures: 'No court on the 12th April, 1870.' Across these words is a pen-line drawn. Immediately following there is the following entry: 'Record the railroad stock and resolution of acceptance of the same on the 12th.'"

For the reason that the records of the county court could not be proved in this way, but must be proven by a certified copy thereof, the court sustained said objection. To this ruling of the court the plaintiff in error, at the time, excepted.

The defendant in error offered to prove by A. L. Gilstrop, one of the corporators named in the charter of the Missouri & Mississippi Railroad Company, "that said corporation did not organize and accept said charter within the time prescribed by the statutes of Missouri; that is to say, said corporators did not organize and accept said charter within one year from the time of granting it."

The defendant in error objected to the introduction of said evidence, on the ground that it was immaterial and irrelevant to the case.

The Court sustained said objection. To this ruling of the Court the plaintiff in error, at the time, excepted.

The plaintiff in error offered to prove by this same witness that at the time of making said subscription the building of said road was a wild and visionary enterprise.

The defendant in error objected to the introduction of this evidence, for the reason that it was immaterial and irrelevant to the issue.

The Court sustained this objection. To this ruling of the court the plaintiff in error, at the time, excepted.

The plaintiff in error offered to read in evidence the proceedings of a public meeting of the tax-payers and citizens of La Plata township, in Macon County, held in the town of La Plata, Macon County, Mo., on the 14th day of April, 1870, (only *two* days after the making of said pretended subscription,) and published in the Macon Weekly Times, a weekly newspaper printed and published in Macon City.

The defendant in error objected to the reading of said proceedings in evidence, for the reason that he resided in Portsmouth, New Hampshire, and the publication of said proceedings in said newspaper in Macon City, Missouri, did not impart any notice to him of the bribery, fraud, and corruption charged in said proceedings.

The court sustained said objection. To this ruling of the court the plaintiff in error, at the time, excepted.

Similar meetings were held between the 14th of April, 1870, and the 6th day of June following in 12 out of the 14 townships in the county, the proceedings of which were published in the Macon Weekly Times and the Macon Weekly Journal in the ensuing issue of these papers. But they were all excluded as evidence for the same reason as the proceedings of the meeting held at La Plata.

The plaintiff in error read in evidence a copy of the record of the suit of J. S. Newmyer and J. B. Clark, two tax-payers, against the County Court of Macon county, the Missouri and Mississippi Railroad Company, and Bartholow, Lewis & Co., commenced in the Circuit Court of Macon county, Mo., on the 11th day of June, 1870, to have said subscription declared null and void and the bonds issued in payment thereof canceled.

This suit is reported in 52 Mo. R. p. 81. At the close of the evidence of the plaintiff in error, at the request of the defendant in error, the court gave the following instruction to the jury, viz: "And now, November 24th, 1874, the plaintiff, upon the closing of the evidence on behalf of the defendant, asks the court to instruct the jury that the evidence of the defendant is insufficient to support the defense, and the plaintiff is entitled to a verdict for the amount of the coupons sued on, with 7 per cent. interest from the dates at which said coupons respectively mature."

To the giving of this instruction to the jury the plaintiff in error at the time excepted.

The jury then found a verdict for the defendant in error, and assessed his damages at $9,697.79, and the court rendered judgment thereon. The same day the plaintiff in error filed a motion for a new trial, assigning the usual reasons, which the court overruled, and the plaintiff in error duly excepted, filed its bill of exceptions and brought this case to this court by writ of error.

Assignment of errors.

1. The court below erred in the admission of the testimony of George M. Edgerton, on the part of the defendant in error at the time it was admitted, for the reasons set forth in the objection of plaintiff in error to its admission.

2. The court below erred in the exclusion of evidence offered by the plaintiff in error on the trial of said cause.

The names of the witnesses and the testimony sought to be elicited from them are specifically set out in the foregoing statement.

3. The court below erred in giving the instruction to the jury which it did at the request of the defendant in error.

4. The court below erred in not giving judgment on the pleadings and evidence for the plaintiff in error instead of the defendant in error.

5. The court below erred in holding that the County Court of Macon County, had authority to subscribe $175,000 to the capital stock of the Missouri and Mississippi Railroad Company, on the 12th day of April, 1870, without the assent of two-thirds of the qualified voters of Macon County.

6. The court below erred in not holding the subscription void on account of the fraud, bribery, and corruption by which it was secured, and the constructive notice thereof which the defendant in error had.

Brief.

On this record the plaintiff in error makes the following points, and relies on the following authorities to support them:

I. A railroad company is a *private* corporation. A county is a political subdivision of the State, is established for *public* and *governmental* purposes, and as such, in the absence of express constitutional authority, it has no authority to subscribe to the capital stock of a railroad company.

Whiting vs. *Sheboygan and Fon Du Lac R. R. Co.*, 25 Wis., 167;

People ex rel vs. *Salem*, 20 Mich., 452;

Loan Association vs. *Topeka*, 20 Wall., 555.

The State vs. *Osawkee Township*, 14 Kansas, 418.

Hence, any law which imposes a tax, a burthen upon the tax payer, without his consent, should be *strictly* con-

strued, and if there is any doubt, that doubt should be resolved against the bond holder, and in favor of the tax payer.

Pennsylvania R. R. Co. vs. *Canal Co.*, 20 Pa., 9;
Rice, vs. *Railroad Co.* 1 Black, 580;
Bailey vs. *Maguire*, 22 Wall., 215.

II. Power to subscribe to the capital stock of a railroad company, is not a *vested* right. It may be annulled, withdrawn, modified, changed, enlarged or restrained by constitutional or legislative act.

Concord vs. *Portsmouth Savings Bank*, 2 Otto, 625;
Aspinwall vs. *Commissioners of Daviess County*, 22 How., 365;
State of Maryland to use of Washington County vs. *Baltimore and Ohio R. R. Co.*, 3 How., 534;
Head vs. *Curators of State University*, 47 Mo., 220;
S. C., 19 Wall., 536;
Ochiltree vs. *R. R. Co.*, 53 Mo., 113;
S. C., 21 Wall., 249;
U. P. R. R. Co., vs. *Davis County*, 6 Kansas, 256.

III. The Act of the General Assembly of the State of Missouri, entitled, "An act to incorporate the Missouri and Mississippi Railroad Company," approved February 20, 1865, was a mere *offer* on the part of the State to the corporators therein named, to confer upon them the franchise of building a railroad between the points named in said act, and this offer was not binding on the State until it was *accepted* by said corporators. Neither was it binding on said corporators until accepted, and they were not bound to accept it.

2 Kent 312; A. & A. Cor., §§ 81–82–83–85;
Ellis vs. *Marshall*, 2 Mass. 269;
Trustees of Vincennes University vs. *State of Indiana*, 14 How., 269, 280.

IV. Before the acceptance of said charter the new constitution of Missouri was adopted and went into operation on the 4th day of July, 1865, and said charter became

subject to the following provision: "The General Assembly shall not authorize any county, city or town to become a stockholder in, or loan its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent there to." (Constitution of Missouri, § 14, Article XI.)

This constitutional provision *modified* the charter so as to annul the power of an irresponsible county court to subscribe to the capital stock of this railroad company without the *assent of two-thirds of the qualified voters of the county.* No such assent having been given, it follows that the subscription and bonds issued in payment thereof, are null and void.

Concord vs. *Portsmouth Savings Bank*, 2 Otto, 625;
Aspinwall vs. *Commissioners of Daviess County*, 22 How., 365;
State of Maryland to use of Washington County vs. *Baltimore and Ohio R. R. Co.*, 3 How., 534.
Ochiltree vs. *Railroad Company*, 53 Mo., 113;
S. C., 21 Wall., 249;
U. P. R. R. Co., vs. *Davis County*, 6 Kansas, 256;
St. Jo and Denver City R. R. Co., vs. *Buchanan County Court*, 39 Mo., 485;
State ex rel, Lexington and St. Louis R. R. Co., vs. *Saline County Court*, 45 Mo., 242.

V. It is admitted that a charter, when *accepted*, is a contract between the State and the corporators, and within the protection of the 10th section of the first article of the Constitution of the United States. But prior to its acceptance by the corporators, it is a mere offer to them of the franchises named in the act, which they may accept or not, at their option, and which the State may withdraw, modify, change, enlarge or restrain before acceptance at its option. The charter of the Missouri and Mississippi Railroad Company was *modified* by the constitutional provision before cited, so as to require the assent of two-thirds of the qualified voters of Macon County

to the County Court thereof, making any subscription to the capital stock of said company, before the acceptance of said charter by the corporators. The court below, erred then in refusing to allow the plaintiff in error to prove by A. L. Gilstrap, that the corporators did not accept said charter until after this constitutional provision had gone into operation. (Transcript, p. 158.)

VI. The foregoing section of the constitution does not require any legislative action to put it in force. It executes itself *proprio vigore*. It was intended to prevent irresponsible County Courts (liable to be bribed and corrupted as in this case) from making subscriptions and imposing heavy taxes on the tax payers without their consent. It is practicable to bribe and corrupt three County Court justices, or a majority of them. But it is impracticable to bribe two-thirds of the qualified voters of a whole county.

St. Joseph Board of Public Schools vs. *Patten*, 62 Mo., 444;

Blair vs. *Ridgley*, 41 Id., 63;

Drehman vs. *Stifel*, Ibid., 184;

State vs. *Neal*, 42 Id., 119;

St. Jo. and *Denver City R. R. C.* vs. *Buchanon County Court*, 39 Mo., 485;

State ex rel vs. *State Board of Equalization*, 44 Id., 294.

VII. At the time of granting the charter of the Missouri and Mississippi Railroad Company, the following provision of the general statute in regard to corporations was in force, viz: "The charter of every corporation that shall *hereafter* be granted by the Legislature, shall be subject to *alteration, suspension and repeal*, in the discretion of the Legislature." (§ 7, Chap. 33, p. 371 Revised Statutes of 1855.)

The charter of this company does not exempt it from the operation of the foregoing section, as is shown by the 14th Section thereof (p. 131 of transcript).

"No stockholder shall be liable for more than the amount of his stock, *nor shall this charter be liable to be repealed or annulled within the time limited for the completion of said road*, nor then if the said company should have finished the road." *Expressio unius est exclusio alterius.* This charter was taken, then subject "to alteration and suspension."

This right of the legislature to *alter* or suspend this charter entered into and became a part of it as clearly and palpably as if they had been incorporated into it *in totidem verbis.* (Tomlinson *vs.* Jessup, 15 Wall., 454; Miller *vs.* State *ibid*, 478; Pacific Railroad *vs.* Renshaw, 18 Mo., 210; Story *vs.* Jersey City and Bergen Plank Road Co., 1 C. E. Green, 14; The State, Warren R. R. Co., Prosecutor, *vs.* Person, 3 Vroom, 134, 566; Mowry *vs.* Indianapolis and Cincinnati R. R. Co., 4 Bissel, 76.)

VIII. The words "shall not be subject to alteration or suspension," were left out of this charter *ex industria* as will be seen by reference to the charters granted to other railroad companies. (§ 8, p. 428, session acts 1859–'60; § 19, p. 432, *ibid*; § 6, p. 434, *ibid*; § 22, p. 439, *ibid*; § 8, p. 441, *ibid*; § 22, p. 414, *ibid*; § 18, p. 419, *ibid.*

Many other references might be made to charters to be found in the session acts prior to 1861, in which they are expressly excepted from the operation of the general statute in regard to private corporations, when it was the intention of the legislature to do so. But the exceptions cited are sufficient to prove the rule.

In the matter of Oliver Lee & Co's Bank, 21 N. Y., 9. In the matter of the Reciprocity Bank, 22 *id.*, 9; S. C. 29 Barb, 360. Meriden Dam Co. *vs.* Gray, 30 Me., 548. State, Warren R. R. Co. Pross. *vs.* Person, 32 N. J., 134. St. Joe and Denver City R. R. Co. *vs.* Buchanan County Court, 39 Mo., 485. Session Acts, 1860–61, sec. 1 and 2, p. 60. Sec. 17, Chapter 63 Gen. Statutes, 1865, p. 338.

The aspect of this case, as presented under the 7th and

8th points *supra* was neither presented by the counsel nor considered by the court in the case of the State *ex rel.* Missouri and Mississippi R. R. Co. *vs.* Macon County Court (41 Mo., 453). Hence this court will not be trammeled in the consideration of those points by the decision of the Supreme Court of Missouri in that case. If those points had been presented to and urged upon that court, it never would or could have given the construction to the charter under consideration which it did. It is in direct contravention of the principle which it had enunciated in the case of the St. Jo. and Denver City R. R. Co. *vs.* Buchanan County Court, (39 Mo., 485,) and afterwards in the case of the Leavenworth & Des Moines R. R. Co. *vs.* Platte County Court, (42 Mo., 171.)

This corporation did "not organize and commence the transaction of business within *one* year from the date of its incorporation," as required by the sixth section of the Revised Statutes of 1855, then in force (p. 371). After that time the corporation had no authority to exercise the functions of a corporation, when this subscription was made. There was no corporation *in esse.* There was no legal entity to subscribe to; and the plaintiff in error should have been allowed to have shown this fact by Gilstrap, one of the corporators; and it was error not to allow it to be shown.

Town of South Ottawa vs. *Perkins*, 4 Otto 260;
State vs. *Dawson*, 16 Ind., 40;
Camp vs. *Byrne*, 41 Mo., 525;
Ruby vs. *Shain*, 54 Mo., 211;
Mokelumne Hill Mining Co. vs. *Woodbury*, 14 Cal., 424.

The word "may," in the 30th section of chapter thirty-nine (Revised Statutes of 1855, p. 427) has been construed by the Supreme Court of Missouri to mean that the County Court *must* or *shall* "cause an election to be held to ascertain the sense of the tax-payers of the county." (Leavenworth & Des Moines R. R. Co. *vs.* Platte County Court, 42 Mo., 171.) This section was amended by an act

entitled "An act supplemental to an act entitled 'an act to authorize the formation of Railroad Associations and to regulate the same,'" approved December 13th, 1855, approved March 23d, 1861. (Session Acts, 1860–61, p. 60.) This act made it peremptory on the county to cause an election to be held in the manner prescribed in said act; and the second section of said act was couched in the following very emphatic and expressive words, viz:

"*It shall not be lawful* for the County Court of any county to subscribe to the capital stock of any railroad company unless the same has been voted for by a majority of the resident voters, who shall vote at such election under the provisions of this act."

This act shows a very marked change in the policy of the State, as represented through its Legislature. Doubtless, it had been discovered, even then, that three county court justices were not incorruptible. This policy was still further changed when the new constitution was adopted, in 1865. Then the incorruptibility of three county court justices was a myth. The rebellion had intervened and demoralized society generally, and county court justices in particular. They could not be trusted with the authority to subscribe hundreds of thousands of dollars to wild and visionary railroad enterprises. The inducements held out were too great, and human nature too weak. Hence, the framers of the new constitution, having learned wisdom from observation and experience, incorporated into that instrument the following provision, viz: "The General Assembly shall not authorize any county, city, or town to become a stockholder in, or loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto."

This provision in the constitution was carried into effect by the General Assembly at its next session, after the adoption of this constitution (§7 Chap., 63 p. 338 Gen.

Statutes, 1865), requiring the assent of two-thirds of the qualified voters of the county as a *sine qua non* to the validity of any subscription by the county court to the capital stock of a railroad company. These statutes and constitutional provision are in *pari materia* and must be construed together. How a subscription made by a *corrupt* county court, or at least a majority of its justices, can be held binding on the county, when 90 per cent of all its tax-payers were opposed to it and actively resisting it with all the moral and legal means in their power, save an injunction, "passeth all understanding."

IX. The purchaser of bonds is bound to take notice whether the party issuing them has authority to do so.

Marsh vs. *Fulton County*, 10 Wall, 676;
The Floyd Acceptances, 7 *id.*, ;
St. Joseph Township vs. *Rogers*, 16 *id.*, 644;
Sherrard vs. *Lafayette County*, 3 Dillon, 236;
Anthony vs. *Jasper County*, 3 Central Law Journal 321;
Bayley vs. *Taber*, 5 Mass., 286;
Township of East Oakland vs. *Skinner*, 4 Otto., 255;
Town of South Ottawa vs. *Perkins*, 4 Id., 260.

Alderman was *bribed*. This disqualified him from participating in the subscription. Hess received $1,000, and the appointment of Land Commisioner, besides other considerations. This disqualified him. Roberts was a stockholder and director in the M. & M. R. R. Co. This disqualified him. (Washington Ins. Co. *vs.* Price, Hopkins, Ch., R. 1; Oakley *vs.* Aspinwall, 3 N. Y., 547; Edwards *vs.* Russell, 21 Wend., 63; Foot *vs.* Morgan, 1 Hill, 654; Richardson *vs.* Welcome, 6 Cush., 331; Commonwealth *vs.* McLean, 4 Gray, 427; Pierce *vs.* Atwood, 16 Mass., 324; Cumberland Coal Co. *vs.* Sherman, 30 Barb., 553; Davoue *vs.* Fanning, 2 John., Ch. R., 252; Michaud *vs.* Girod, 5 How., 554; State *vs.* McKay, 43 Mo., 584; State *vs.* Bank of Missouri, 45 *id.*, 528).

X. The court below erred in the admission of Edger-

ton's testimony on the part of the defendant in error, for the reasons assigned in the objection of plaintiff in error. It is an improper practice. By the very course taken, the defendant in error admitted the weakness of his cause, and that it needed bolstering up. (Michigan Bank *vs.* Eldred, 9 Wall, 552; Carpenter *vs.* Longan, 16 *id.*, 273; Chambers County *vs.* Clews, 21 *id.*, 321; Bank of Metropolis *vs.* New England Bank, 1 How., 239).

The answer of the plaintiff in error was filed seven months before the trial. This imparted full notice to the defendant in error that among other defences that would be relied on at the trial, was the defence that the subscription in question and the bonds issued in payment of it had been procured by *fraud, bribery, and corruption*, and that he had purchased the bonds with *notice* of this defence. He had ample time to have given his deposition, and he had a right, under the laws of the State, to testify, yet he never purged *his* conscience on the subject, as he ought to have done. (Smith *vs.* Sac County, 11 Wall., 139; Chambers County *vs.* Clews, 21 *id.*, 321; McKessan *vs.* Stansberry, 3 O., St. R., 156; Monroe *vs.* Cooper, 5 Pick., 412; Woodhull *vs.* Holmes, 10 John., 230; Bank of St. Albans *vs.* Gilliland, 23 Wend., 311; Grand Chute *vs.* Winegar, 15 Wall., 373).

The court below improperly excluded the evidence of the tax-payers' meeting, denouncing the action of the county court in making the subscription in question. This evidence was material to the issue whether the defendant in error was a *bona fide* holder of the coupons sued on or not. As these bonds were issued by *fraud, bribery, and corruption*, the defendant in error could have ascertained this fact by inquiry of any citizen of the county. He did not do so. He should have done so. Ordinary prudence would have dictated to him to have done so. And, failing to have done so, he stood before the court in the attitude of a *mala fide* purchaser and holder.

McClure vs. *Township of Oxford*, 4 Otto., 429.

The instruction was erroneous in taking the case from the jury. The uncontroverted facts proved by the plaintiff in error constituted a valid legal defence, and, on the evidence, the court should have instructed the jury to find for the plaintiff in error.

For the foregoing reasons, it is respectfully submitted that the judgment of the court below is erroneous, and should be reversed and remanded.

JAMES CARR,
Of Counsel for the Plaintiff in Error.

IN THE

Supreme Court of the United States.

THE COUNTY OF MACON,

Plaintiff in Error,

vs.

JAMES F. SHORES,

Defendant in Error.

No. 123.

WRIT OF ERROR TO THE WESTERN DISTRICT OF MISSOURI.

STATEMENT.

Defendant in error brought his several suits in Circuit Court for the western district of Missouri, upon coupons detached from bonds, made and issued by the plaintiff in error. The suits so brought were consolidated, the aggregate amount claimed being $8,840 and interest.

The petitions alleged that the coupons sued on were detached from bonds made by Macon county (a copy of one of the bonds being set out on page 126, printed record). The coupons all being similar in form, (a copy of the coupon being set out on